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Women in the civil courts -
(Research study no.9)

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WOMEN IN THE CIVIL COURTS

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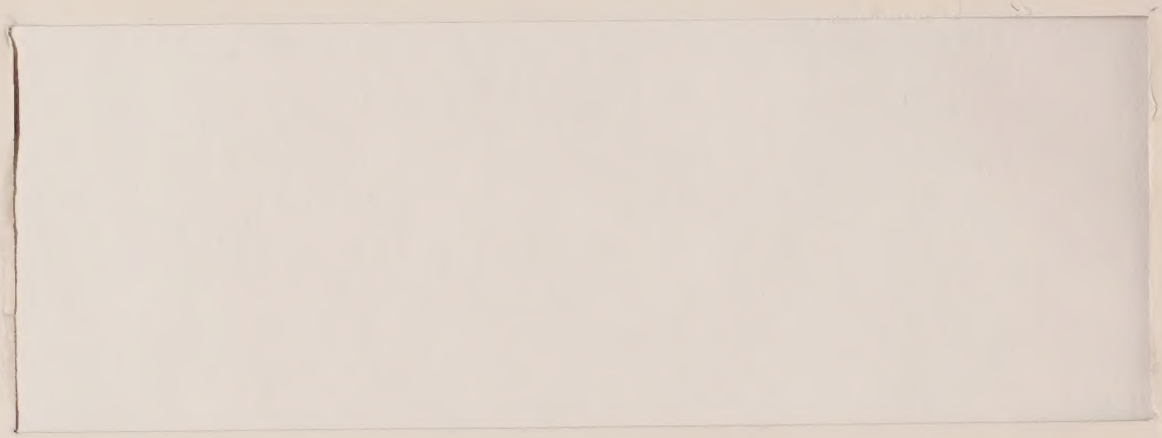

WOMEN IN THE CIVIL COURTS

Research Study # 9

by

C. McKie and P. Reed

The responsibility for the analysis
and interpretation of the data is
that of the authors and not of
Statistics Canada

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PREFACE

This publication presents results drawn from the survey of civil litigation in Canada carried out by Statistics Canada in 1974 and 1975. The project was completed with the assistance of the Federal Department of Justice which provided partial financial support in the later stages of the project. Additional data were drawn from the ongoing analysis of records of the Central Divorce Registry of the Department of Justice.

Additional details on the survey of civil litigation are to be found in Civil Justice in Canada, Parts I and II, which is research study number 8 in this series.

As authors, we naturally bear final responsibility for editional and substantive aspects of this study, and for any errors of fact or judgement.

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Introduction

The resolution of private conflicts is a continuing and requisite activity in societies that acknowledge the legitimacy of disparate and competing individual and corporate interests. Permitting and even fostering the contention of interests in the name of deeply-seated ideological principles creates a social milieu rife with conflicts, both major and minor. Most of these conflicts are resolved informally, usually in the process of mutual concession granting known as bargaining. But if bargaining is unsuccessful, resort must be made to some sort of conciliation or adjudication. In increasing degrees of formality and institutional involvement, a disagreement winds its way towards the civil courts as the positions of the parties become entrenched.

Into the civil courts come a great variety of cases which share little in common except the fact that the conflicts are not criminal in nature, and that less formal methods of conflict resolution have proved inadequate. It is somewhat surprising therefore that civil litigation in Canada has not received more scholarly attention. Participants in the process either as practitioners or litigants no doubt form generalizations on the basis of their experiences, but few have approached the civil justice system as a whole from the analytical point of view of the outsider. Some of the reasons for this lack of attention are practical.

Firstly, in attempting to move past the single court as an object of study, not inconsiderable problems of comparability arise. There is considerable variation in civil procedure in the provinces and territories, and between individual courts. These differences relate to practice, record keeping, the hierarchy of courts, the terminology employed, the remedies available; and indeed the whole legal basis of actions may vary. These

differences make broad national description and analysis very difficult, particularly where one wishes to focus on one type of litigant, in this case women.

A second source of practical difficulty concerns the great variety of cases brought and the very large variation in the gravity of those cases. Civil litigation is not, in short, a homogeneous phenomenon; as a category, it embraces the highly visible matter of divorce, petty disputes over small unpaid debts, minor and major traffic accident injury cases, battles for corporate control, and many other types of cases which defy easy description.

One can thus readily understand why, while civil law is a cornerstone of legal education, it has received so little scholarly attention in the form of systematic study as an important social phenomemon. The resources to undertake a national study of such a process seldom become available -- and the practical problems and difficulties to be faced are considerable. Such an opportunity did present itself in the form of a secondary analysis of two large datasets: the Civil Courts Survey, an endeavour of the Justice Statistics Division of Statistics Canada with some support by provincial governments and the federal Department of Justice, and the files of the Central Divorce Registry. Detailed discussions of these sources will be presented subsequently but first it is necessary to briefly sketch, in a theoretical vein, a view of the nature of civil justice -- where it fits in the resolution of conflict in society, and some of its broad features.

Some General Theoretical Concerns

Conflict exists in all societies. The battery of means and methods of bringing it under control, and of reasserting the long-term interests of society usually includes a series of steps up to

and culminating in a formal judicial decision which resolves the issues but does not always necessarily include provisions for enforcement. That formal judicial decision is made on the basis of reconstruction of fact in relation to some code of legitimacy. The basis of that construction of fact stems principally from the adversarial system of legal proceedings.

One objective of the various formalized methods of legal proceedings is to discover truth, or at least to construct a plausible facsimile. The main method chosen to do this is the taking of oral evidence under oath. As the Quakers have pointed out for 300 years, the existence of the oath implies that in its absence people will lie. But under oath, and the threat of sanctions, the presumption is, as Scheff has put it, that ".....interrogation, when it is sufficiently skillful, is essentially neutral. Responsibility for past actions can be fixed absolutely and independently of the method of reconstruction". (1968:3)

What may actually happen, though, is that prior to the formal hearing of evidence, there takes place the consensual creation of a concordant definition of reality, much in the same way that plea bargaining in criminal cases results in a plea of guilty to a reduced charge. This definition of reality is constructed with an eye toward, and as the basis for, ensuing legal activity in the case.

As to the probability of a conflict reaching court in the first place, there are a number of important factors operating. First, there must be a contract or an equivalent statutory obligation. Such an obligation may be explicit, as in the case of a valid contract, or implicit, as has been the obligation imposed by the unwritten promise to marry. The nature of the civil contract is almost limitless in the number of forms and applications it may take. While the dictates of public policy may forbid certain types of contracts from being legitimately made (e.g., usurious loan agreements), in general, persons and corporate entities may enter

into valid contractual agreements on virtually any aspect of their activity. The difference between these contracts and agreements of a more informal sort lies in the exchange of "good and valuable consideration" at their signing, and in the fact of access to the civil courts for their enforcement in the case of violation or default.

In our social order, to engage in certain kinds of activities or to have certain kinds of interests (in the broadest sense) is to incur the risk of dispute, or loss, or violation of rights, with respect to those activities or interests. Risk of loss or violation of legitimate interests and risk of dispute are controlled or reduced through routine legal mechanisms which explicitly spell out rights and obligations. This is done in general form in statutes and judgements, and in more detailed form in contracts.

Among the most common kinds of contracts are mortgages and other debt instruments (such as loan agreements and promissory notes), leases, sale and purchase agreements, contracts for an undertaking or performance of some kind (such as constructing a building), and agreements setting out the terms and conditions of employment.

Thus, to the extent that a person or a class of persons abstains from activities or interests of these kinds, they are to that extent less contractprone and thus proportionately less likely to sue or be sued.

In addition to property rights which are at the heart of most of the above examples, there are certain other litigable rights which are conferred by legislation. Labour law, consumer law, and Human Rights legislation, for example, create classes of wronged persons who are given access to the courts for redress. While the tendency of late has been to make this redress

available through quasi-judicial review boards and regulatory agencies, there is often a right of appeal to a court, if only on the grounds that the terms of the legislation have not been correctly or appropriately exercised by such an agency. This latter (general) type of right is somewhat more ephemeral since it rests on (changeable) legislation, but nevertheless, it is a significant source of civil litigation. Here again, the extent to which they are codified in general statements of rights will determine the extent to which a person or class of persons are able to sue or be sued.

In addition to an alleged violation of a contractual agreement or a statutory right, there must also be an awareness of one's legal position and one's rights, along with a will to contest a conflict within the justice system. In contrast to criminal cases where the State assumes the role of initiator and prosecutor, in civil actions a plaintiff, whether an individual or a corporate entity, must sustain the action on his own. This often means assuming the costs of legal representation and associated court costs and also maintaining the will to litigate over a prolonged period. The loss of will results in discontinuation of the case in one way or another.

Finally, in addition to a violated right and the will to litigate there must be a failure of informal methods of conflict resolution. The fragmentary literature in the area of civil litigation suggests several hypotheses in the explanation of observed behaviour.

Speaking specifically of business litigation, Evan suggests that:

> "... I would hypothesize that the greater the bargaining power differential between the organizations, the more likely their transactions will be contractual in nature. In addition, the greater the power differential between the organizations, the less likely conflicts between

> them arising out of a contract will be settled by legal methods, whether by litigation or arbitration, unless the organization that has less power is capable of pooling its resources with other organizations similarly disadvantaged by the power of the party in question". (1963:68)

But when an organization sues an individual, the equation is different. Particularly with respect to sales agreements, there is almost invariably a contract prepared by the seller, which a willing buyer has little choice but to sign after a ritual inspection of the terms. Also, the will to collect on defaulted sales agreements is high, a routine and necessary aspect of a sales business. Thirdly as we will show, the probability of success is very high. These factors combined lead us to suggest that the conditions of civil litigation are such as to encourage a great many successful suits for the balance owing on a sales contract. This tendency has cast small claims courts in particular in an unusual light. As Kidder has written, for instance:

> "The small claims courts, for example were created in the belief that American law could be simplified and personalized for the "average citizen". They were supposed to offer inexpensive, uncomplicated, quick solutions to the "small" problems faced by ordinary people. Instead, they were transformed into tools of business who used them as collection agencies for unpaid bills". (Kidder 1974: 17-18)

This finding would suggest in part that, at least as defendants, the various social types would be represented in court records to the extent that they default on contracts, and further that persons who seldom signed sales agreements in the first place would be underrepresented.

It is widely believed in this society, that, relative to men, women as a social category have difficulty in obtaining credit of

all sorts*. Were this to be the case, they would therefore be underrepresented as defendants in civil actions. Likewise, social categories which do not routinely dispense credit should be underrepresented as plaintiffs. Given the extent to which the receipt of income and the possession of assets in Canadian society has tended more and more to involve pooling in concentrated corporate entities such as the chartered banks and financial corporations, it would not be unexpected to find that credit grantors would be organizations, thus plaintiffs, more often than not.

Statutory obligations, particularly in marital contracts, are in like manner imposed disproportionately on males. The Victorian presumptions of the need for the support and protection of the "helpless" females have resulted in a great many nonreciprocal financial obligations on males. This would tend to enhance their role as a defendant party in marriage related suits.

Many, perhaps a majority of disputes, are settled before they reach court.** We must presume in these cases that either willingness to undertake full litigation is not vigourous (perhaps because of legal fees), or because the contract is weak or unconscionable, or because of the probability that in the process, some other valuable commodity (e.g., time) will be lost.

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* While we don't have conclusive evidence on this point, it is generally conceded that Canadian law historically has provided more limited property-holding rights for women than for men; and typically, it is on the basis of the prior possession of property (in the broadest sense) that credit is extended.

** Galanter has written, for example:

> The disputes that get to courts have surmounted many barriers; barriers of awareness, cost, procedural access, substantive law, legal services, etc. The structure of these barriers varies from one society to another. Most disputes never show up in the official system -- either because they fail to surmount these barriers or because they find another forum. (1974:2)

Macaulay describes such a negotiated settlement as routine. He writes that:

> "Even where the parties have a detailed and carefully planned agreement which indicates what is to happen if, say, the seller fails to deliver on time, often they will never refer to the agreement but will negotiate a solution when the problem arises apparently as if there had never been any original contract." (1963:61)

Especially in the context of business relations, the suit has become exceptional -- negotiated settlements being the pervasive norm. For example, Macaulay continues:

> "Law suits for breach of contract appear to be rare.....a law firm with more than 40 lawyers and a large commercial practice handles in a year only about six trials concerned with contract problems. Less than 10 per cent of the time of this office is devoted to any type of work related to contract disputes." (1963:6)

If litigation is thus a minor part of the corporate lawyer's daily activity, one must presume that the balance of the time is spent in other, less overtly conflictful, pursuits. There are a number of excellent reasons why this should be the case. Formal legal action to resolve disputes often creates bad feelings, frequently resulting in the souring of relations between habitual sellers and buyers, thereby curtailing the potential market for one's goods and services. There is thus an important economic reason for making formal proceedings a last resort. In addition, turning a problem over to lawyers results in a loss of control by the parties of the conduct of their dispute -- a matter of no small importance when there is much more to be considered than simple enforcement of contractual terms. Public relations considerations alone may outweigh the monetary loss, particularly where the latter can be factored as an account receivable to a collection agency or written off for tax purposes.

Cases that get to the Courtroom

The central objective of this paper is to describe and analyse the nature of those cases which persist past whatever efforts there may have been to terminate them before the parties get caught up in the formal legal process. In so doing, we have a meagre amount of Canadian literature or fact to inform the analysis. The picture is somewhat brighter with respect to U.S. courts but, as always, we must remember the distinct differences in both form and philosophy between Canadian and U.S. courts. For example, Hagan and Leon (1978) have recently written of the radically different views of social control implicit in Canadian and U.S. criminal court activity, speaking of a Canadian "commitment to the Burkean ideal of social order first and individual rights second" (1978:202).

The much greater official commitment of U.S. tradition to the preservation of individual non-property rights might be expected to produce a greater number of cases overall, and a larger proportion undertaken to uphold principles of one sort or another. But be that as it may, the American literature is instructive in that far more detailed study of the civil justice process has been carried out.

Galanter, for example, has characterized model types of litigants, giving special attention to what he calls "repeat players" or habitual litigants (called the "court birds" in India). These are persons or organizations which have "had and anticipate repeated litigation, which have low stakes in the outcome of any one case, and which have the resources to pursue their long-run interest"(1974:4).

These characteristics are most often possessed by organs of government and by business. He goes on to suggest that it is most often the case that "repeat players" sue "one-shotters" (predominantly individuals)* far more often than in any other type

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* The distinction in essence is between those for whom litigation is routinized and those for whom it is a crisis.

of case. In fact he suggests that in "something in excess of two-thirds of all litigation in American courts the strategic configuration of the parties is 'repeat player' versus 'one-shotter' (1974:14). The former probably have unique strategic goals in litigation such as making an example of a particularly flagrant case of willful default -- or underplaying the importance of the defaulted debts of widows and orphans. Sacrifices of time and expense are justified in terms of these higher aims but not in terms of a particular case.

Citing evidence from Wanner (1974, 1975), Galanter reaches a number of conclusions which confirm a rather cynical view of civil justice. The courts, he suggests are:

a) Overwhelmingly forums for, dominated by, and favouring the plaintiffs;

b) forums in which businesses and governments win more often and more quickly than individual plaintiffs (they attain "complete victory" in 65% of cases in contrast to only 20% for individual plaintiffs)

c) by implication, forums where delay is the most effective defensive strategy.

His summary statement presents a bleak picture of civil justice in the United States. He writes:

> "Litigation is undertaken primarily by organizations. They enjoy greater success at it. These data, assembled by various authors for quite different purposes, lend some plausibility to our surmises about the profile of litigation and the general tilt of the judicial forum. We cannot escape the conclusion that in gross the courts in the United States are forums in which organizations extract from and discipline individuals" (1974:24).

Litigants with experience might choose better cases to litigate, or have better lawyers, or have the easiest cases to win (e.g., the collection of debts), or judges may grow to respect the ability of frequently-seen counsel; but for whatever reason, the casual litigant seems at a distinct disadvantage in the civil courts in the United States. Another American scholar has remarked that "...'the law', as it develops and changes, is the product of group competition...this process only increases the competitive edge which certain groups hold in the struggle to shape law, whether through judicial interpretation or legislative enactment" (Shover, 1973:255).

The question then must be asked whether this pattern is repeated in Canadian civil courts. Given a greater Canadian ideological thrust to uphold the legitimacy of institutions at the expense of individual rights, it is appropriate to ask whether the outcome of civil cases in Canada might be even more sharply one-sided with respect to outcome. On the other hand, if Canadian lawyers were deeply committed to the Burkean view, they might well stifle litigious intent on the part of individuals, before such disputes even reach the courts at all. For as Shover has indicated, the lawyer is a reality-defining agent. He is, as Shover says, "faced with the problem of deciding when a client's complaints are sufficiently serious to warrant further action on his part and, if so, what that action should be" (1973:256).

It is important to grasp that there are at least two aspects to the civil litigation under discussion here: dispute settlement, and the securing of a legitimate enforcement order in cases where there is little serious dispute over the legitimacy of a claim. That is to say, some cases involve a legitimate disagreement, while in others, the disagreement reflects only an attempt by one party to stave off the enforcement of an obligation pursuant to a legitimate contract or court order.

Particularly in the latter case, the objective (i.e., the strategy for defendants) must be delay, and for the plaintiff to wear down the resistance of the opponent. Success in litigation, says Kidder (1974:33) reflects not so much the operation of rules of adjudication but rather that "litigational outcomes are better predicted by the predictors of success in negotiation -- strategic advantages of wealth, influence, prior experience, etc." This view would suggest that members of disadvantaged groups in society would tend to fare poorly relative to advantaged groups in the courts.

In a discussion of the higher rates of success of what he calls "repeat players" - or habitual institutional litigants, Galanter (1974b) suggests a rationale for the disproportionate success experienced by the powerful. He writes:

> We would expect 'repeat players' to "settle" cases where they expect unfavourable outcomes. Since they expect to litigate again, 'repeat players' can select to adjudicate (or appeal) those cases which they regard as most likely to produce favourable rules. On the other hand, 'one-shotters' should be willing to trade off the possibility of making "good law" for tangible gain. Thus, we would expect the body of "precedent" cases - that is cases capable of influencing the outcome of future cases - to be relatively skewed toward those favourable to 'repeat players'. (1974b:10)

'Repeat players' are also much more likely to have continuing relationships with lawyers whom they use habitually for litigation. The mere fact of having a lawyer appears to increase the odds of success. Ross states boldly, for instance: "parties who have lawyers do better". (1970:193)

The organized, the wealthy, and the culturally dominant enjoy a range of inter-linked advantages. Again, following Galanter, they have access to the resources which tend to produce "success" in litigation: the ability to frame the initial contract to their advantage, access to specialized expertise, bargaining credibility, the ability to erect cost and delay barriers, to name a few (1974b:125). Offsetting these advantages are the restrictions of equality before the laws. These rules:

> do not permit them to deploy all of their resources in the conflict, but require that they proceed within the limiting forms of the trial. Thus, litigation is a particularly tempting arena to "have nots", including those seeking rule change. Those who seek change through the courts tend to represent relatively isolated interests, unable to carry the day in more political forums. (1974b:135)

It is with these considerations in mind that we move to a description of the data which forms the basis of this study.

Data Sources

Data for this study were drawn from two sources: a survey of civil court records carried out between November 1974 and March 1975, and the records of the Central Divorce Registry for the years 1969 through 1977 for all divorce cases initiated during that period. Details of each source will be briefly described below.

The Civil Justice Survey

Between November 1974 and March 1975, a survey of civil court records was carried out by Statistics Canada. This survey, details of which will be briefly described below, was carried out to fill an obvious gap in our knowledge of the system of civil litigation

in Canada. The survey was exploratory by design and had two objectives: to accumulate substantive information on the civil court caseload in Canadian courts in 1971; and to provide information on the practicalities of gathering and analysing such information.

After a lengthy period of testing, a coding form was finalized and data were duly recorded in a stratified random sample of 13,815 cases at all court levels, and in all provinces and territories except Ontario (which chose not to participate in the survey). The sample is selective with respect to cause of action. Included were cases in which a dispute or disagreement of some kind had been submitted to a court during the 1971 calendar year. Excluded from the survey were all surrogate, welfare, divorce, and criminal code cases, as well as cases involving the administration of the courts themselves.

Subsequent intensive editing and checking established that sampling error was low in virtually all courts.*

Owing to the non-availability of crucial data in many cases, however, it is less representative as a sample of information. This is largely the result of statistically inadequate record keeping in the court themselves.**

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* Of a total of 56 courts sampled, sampling error was excessive in only two - both of them Appelate Divisions of Provincial Supreme Courts.

** For substantive and methodological findings from this survey, see C. McKie and P. Reed, Civil Justice in Canada, Statistics Canada, 1978 (Justice Statistics Division, Research Study No. 8, Special Studies Series)

In spite of the practical problems associated with a new venture such as this survey was, the data base does offer the opportunity of carrying out broad, general analysis on a subject never before touched on in this manner in Canada. It allows us to look at certain types of civil litigation in Canada minus Ontario: the characteristics of the litigants, the outcomes of such cases, the estimated total volume of cases, the duration of civil actions, the impact of legal representation, and the tendency to appeal decisions. For the most part, the data lend themselves to detailed description only, though on occasions we offer hypothetical explanations which must await better data for testing, or offer corroboration for the theoretical insights of others. This survey is, then, a one-shot picture of civil litigation in Canada with the exception of Ontario which we are using to explore the treatment of women in the civil courts.

We must reiterate our earlier point that there is no single uniform national system of civil process in Canada. The principles of civil procedure are largely embodied in both written and conventional rules which vary considerably from province to province. The individual must face the system in force in one province only - and not a national average of systems so that we must remain in our analysis attentive to the provincial and territorial differences.

The Central Divorce Registry

When the new divorce law was instituted in 1968, it became mandatory that every petition for divorce filed in Canada be registered with the Central Divorce Registry in Ottawa. It is the information reported on these registration forms that constitutes the body of data on divorce as a singular type of civil litigation for this paper. The forms are filled out in two stages by an officer of the court. When a petition is filed, the first part of the form is submitted to the registry detailing information on

alleged grounds and the court in addition to personal information concerning both husband and wife. When the divorce action is finally legally resolved, the second part of the form is then passed to the Registry. This part outlines the outcome of the action, whether a response was filed, and data on custody dispositions.

Consequently, the Registry includes information on virtually every divorcing couple in Canada since 1969. In the period 1969 to the end of 1977, there were 382,803 such actions brought. The term "divorcing" can be misleading and consequently requires an explanation based on a description of who is being counted. A divorce petition can have three outcomes: it can be dismissed, discontinued, or a divorce can be granted. Generally speaking, we are here considering all those cases that had been resolved (had one of the three listed outcomes) during the period 1969 to the end of 1977, regardless of when the petition was initially filed. Therefore we are not counting active cases (those pending before the court). Typically, "divorcing" implies that a divorce is the ultimate outcome, but we must recognize that in a small proportion of cases - about 1 in 20 - such is not the case due to premature termination of the action.

Because of the large number of women involved (at least 382,803 not counting co-respondents) in the nine year period in question, it seems that for women, the most likely type of civil action for their involvement is concerned with divorce. Routine probate of wills might involve more women annually but these actions are rarely adversarial in nature and thus cannot be legitimately interpreted as normal conflictful civil cases.

Women as Litigants

The proportion of cases in the sample of civil actions in which women were involved at all as parties, in any capacity, is not large. In only 26.2% of the cases studied was there a woman as plaintiff,

defendant or third party. This is in stark contrast to the counterpart figure for males of 81.7%, a total which reflects a much greater show of male defendants. We can thus note initially that women are significantly underrepresented in civil courts in Canada in terms of their proportion in the population.

To put these figures into proper context, however, it must be noted that in only 5,031 of the total of 13,815 cases - about one-third - was a person, male or female, involved as a plaintiff at all. In the remainder of cases, an organization was the plaintiff. Thus the non-personal nature of plaintiffs as a group is a singular characteristic of Canadian civil litigation. Organizations (principally companies) were involved, either as a plaintiff or a defendant in about 74% of all cases in the sample. Further, in 12.8% of the sample cases, organizations were suing organizations and no individual was involved as a party at all.

Women were defendants in only 16.4% of the cases studied in contrast to 74.8% of the cases in which the defendant was male. The discrepancy was, however, much more limited with respect to the sex ratio of plaintiffs. We find, for example, that females are plaintiffs in 12% of the cases, as opposed to 27.9% of the cases in which the plaintiffs are men. This is a large and statistically significant difference, but it is nevertheless not as great as the differences noted between the incidence of men and women as defendants.

The number of cases in which persons are third parties is very small in this sample. This may be the result of the choice of types of case to record. Nevertheless, among these the over-representation of males as third parties continues the trends noted in the previous sections. Specifically, in only seven of the total 13,815 cases did a woman appear as a third party in contrast to a total of 40 cases where males so appeared.

Many hypotheses have been advanced for the underrepresentation of women in civil actions. It might be plausible to suggest that women as a group are unable or unwilling to litigate disputes, assuming of course that litigable conflicts are randomly distributed throughout the population. However, this latter assumption is disputable, largely because credit granting agencies have been unwilling in the past to grant credit to women in their own right. There seems little doubt that this practice has been and continues to be widespread in spite of efforts to change it, largely because the mean income of women, thus their debt-carrying capacity, is so much lower than that of men as a group as to make them appear to be unacceptable credit risks. With less money to lend, they would also find themselves in the role of unsatisfied creditors less often.

One consequence of the refusal to grant credit to large numbers of women has been that the potential for suits against women for recovery of debts is much less than is the case for men. This would be true both because the absolute number of women at risk of being sued is lower, and because the amount of the average defaulted debts would most likely be lower. The result would be fewer actions taken against women because the cost-benefit ratios of suing would be less favourable. Since the suit for the balance of a defaulted loan is the modal action in Canadian civil courts, the lower proportion of women in evidence would seem to confirm the above view, at least with respect to legal role of women as defendants.

Other explanations might be advanced for the noted differences. One might take to be a positive feature the fact that women sue and are themselves sued less often than men. After all, while participation in civil courts is a right, it can certainly not be taken as an achievement of note. Being a party to an action indicates that the informal dispute settlement machinery has

broken down, or that a certain amount of intransigence is involved (and here we must note that probate and divorce cases in which different circumstances obtain were not included in the survey). Equality of the sexes in the proportion of litigants is at best a qualified virtue, and certainly cannot be taken as a goal. It would be somewhat akin to striving for equal proportions of the sexes in jail - when the prior issue of the value having anyone in jail is open to question.

It nevertheless might be the case that women do not bring actions in part because the institutional environment of dispute processing is forbidding, or because some cannot afford the legal costs, or because they receive negative counselling by lawyers, or because they acquiesce more readily in legal disputes than do men. With respect to the first of these possibilities, the hypothetically uncongenial setting of the courts, we have no factual basis for making a judgement, except to note the similar underrepresentation of women in the criminal courts - and the drift of the literature on that subject which tends to uphold an explanation based on a cultural view that women should not as a rule be subject to the same criminal prosecutions and penalties as men. This is, again, a sort of backhanded positive discrimination which has unintentionally good results - i.e., fewer individuals are incarcerated.

Continuing with the alternative explanation, one must consider the impact of cost barriers. We shall subsequently examine this matter in greater detail later, but we must note here that at least in respect to small claims or debts courts, the cost barriers are virtually non-existent. The literature here indicates, however, that such courts (which were designed to facilitate simple and inexpensive suits, by individual citizens) have in practice been far more havily used by companies suing individuals.

With respect to the possibility that potential women plaintiffs are swayed by intimidating lawyers (usually male) disproportionately, we can only examine the incidence of the presence of legal counsel for men and women; this we shall do subsequently.

The truth of the matter probably lies in an amalgam of the above proposed explanations. One must step back and look at the general outlines of the social structure of this society to locate the places into which these various puzzle pieces might best fit.

In any society in which interpersonal competition for scarce resources such as opportunity, wealth, power or advantage is fostered, there is unavoidably a certain amount of risk-taking in the quest for advantage. At least in part, this risk-taking can come to compromise the rights of others. According to one's place in the status hierarchy in such a society, one is more or less active in the competitive processes, and therefore must stand on greater or lesser degrees of jeopardy of becoming involved in a legal dispute, either as a plaintiff or a defendant.

It follows that the rate of participation in civil court actions could reasonably be taken as an approximate measure of the status of persons involved. Thus one would expect to find routine underrepresentation of members of disadvantaged groups in society. Since women are not full fledged participants in the social and economic marketplaces of Canadian society, we would expect that they would be much less likely to become entangled in litigation. In much the same fashion, since few women are involved in serious crimes, they appear much less often than men in criminal courts charged with serious criminal offences.

Thus, we would argue that the frequency with which women are found in civil or criminal cases across the nation is possibly an indicator of their less than full participation, as a class of

persons in mainstream activities in this society. This under-participation in social affairs is a product of culture (the accretion of habits, ways of doing things, socialization, and notions of what behaviour is appropriate for men and women, etc.), and of law (the inbuilt bias in favour of men being major property holders and manipulators). This latter law-produced distortion becomes evident in the non-exercise, by women as a class, of those economic rights which lead through their exercise to participation in civil actions as a "cost" of entrepreneurial activity.

Thus to summarize and fill in the data on the differential rates of involvement in Canadian civil litigation, we find that women as a group are significantly underrepresented in civil courts in Canada. In the sample of cases (N = 13,815) in only 16.4% of cases (or 2,268 cases) was there a woman as a defendant. In most of these cases, there was only a single woman defendant (2,172 or 96%), cases with multiple female defendants being only 0.7% of the entire sample. It should be noted that, in some cases, the females were joined by male defendants.

% of all cases in which			
women were solo plaintiffs:	8.1%	solo defendants:	6.3%
women were co-plaintiffs:	3.8	co-defendants:	10.1
men were solo plaintiffs:	23.2%	solo defendants:	58.7%
men were co-plantiffs:	4.7	co-defendants:	15.8%
organizations were solo plantiffs:	63.6%	solo defendants:	18.3%
organizations were co-plaintiffs:	1.2	co-defendants:	7.2

As approximately 82% of all the actions in the sample had a person or persons as defendants (in contrast to an organization), it may be seen that males are over-represented to a considerate extent in Canadian courts in the ranks of defendants. There was at least one male defendant in approximately 75% of cases. One could interpret this finding to mean that a "normal" rate of participation is present for males, but that the rate for females is abnormally low for the reasons already discussed.

In the total of 13,815 cases, in only 12% was there a female plaintiff. A much smaller proportion of cases (8.1% of the total) were ones in which females alone acted as plaintiffs. The residue of cases in which females were active as plaintiffs, were ones in which a male was also a plaintiff. Cases with multiple female plaintiffs are very rare; the figure of 0.7% being identical with that for the proportion of cases with multiple female defendants as noted in the previous section. Thus females, suing in their own right, without male co-plaintiffs, must be seen as a distinct oddity in Canadian civil courts.

The Structure and Characteristics of Litigation

The exploratory nature of the civil court survey, and the fact that the sample was less than fully national, excluding Ontario as it did, precludes sweeping or unequivocal statements. Necessarily, there is a great complex of factors at work within the civil justice system which are involved in producing a legal outcome. While we cannot explore many specific questions which might be raised concerning the characteristic experiences of women litigants, we can look in some detail at a large group of women litigants with this survey data and answer the question of how women, in general, fare in civil courts.

The first and most obvious of these relationships is presented in Tables 1A and 1B, which address literally the question of "who sues who". In these two tables, we see seven categories of combinations of male, female, and organizational plaintiffs and defendants. It should be noted that in these and many subsequent tables, there is a residual category of both plaintiffs and defendants for whom the sex of the litigants was not recorded. These cases are included in the tables for the sake of completeness only.

The difference between Tables 1A and 1B lies not in their format but in the way the percentages are calculated. In the case of Table 1A, the percentages are expressed in terms of the proportions of each type of object of actions for each type of plaintiff. Then, in Table 1B, an overall distribution of cases by type of plaintiff and type of defendant is presented. This allows the portrayal of the typicality of a particular type of suit (e.g., man sues woman).

Table 1A

Characteristics of Canadian Civil Litigants

(percentage distribution)

Characteristics of Defendants	Characteristics of Plaintiffs							
	female(s) only	male(s) only	organization(s) only	female(s) & male(s)	female(s) & organization(s)	male(s) & organization(s)	male(s) female(s) & organization(s)	characteristics Not Noted*
female(s) only	5.3%	8.2%	5.9%	5.7%	7.1%	4.5%	-	2.6%
male(s) only	64.4	58.8	59.2	47.1	50.0	45.8	47.4%	56.3
organization(s) only	12.8	16.5	19.9	12.9	21.4	27.1	15.8	15.4
female(s) & male(s)	8.9	7.1	9.1	17.0	14.4	2.3	26.3	2.6
female(s) & organization(s)	0.5	0.2	0.3	0.8	-	1.5	-	-
male(s) & organization(s)	7.0	8.4	4.4	13.9	7.1	15.0	10.5	7.7
male(s), female(s) & organizations	1.0	0.4	1.0	2.0	-	3.0	-	2.6
characteristics not noted**	0.1	0.4	0.2	0.6	-	0.8	-	12.8
Totals=	100%	100%	100%	100%	100%	100%	100%	100%
N	(1123)	(3206)	(8786)	(495)	(14)	(133)	(19)	(39)

*Note: Other calculations indicate that of the total of 39 cases where the characteristics of the plaintiff(s) are not known definitively, three cases have at least one female as a plaintiff and 27 have at least one male as a plaintiff.

**Note: Other calculations indicate that of the total of 44 cases where the characteristics of the defendant(s) are not known definitively, four cases have at least one female as a defendant and 17 have at least one male as a defendant.

Table 1B

Characteristics of Canadian Civil Litigants

(Total percentage distribution)

Characteristics of Defendants	Characteristics of Plaintiffs							
	female(s) only	male(s) only	organization(s) only	female(s) & male(s)	female(s) & organization(s)	male(s) & organization(s)	male(s), female(s) organization(s)	characteristics not noted*
female(s) only	0.4%	1.9%	3.7%	0.2%	0.0%	0.0%	-	0.0%
male(s) only	5.2	13.6	37.7	1.7	0.1	0.4	0.1%	0.2
organization(s) only	1.0	3.8	12.6	0.5	0.0	0.3	0.0	0.0
female(s) & male(s)	0.7	1.7	5.8	0.6	0.0	0.0	0.0	0.0
female(s) & organization(s)	0.0	0.0	0.2	0.0	-	0.0	-	-
male(s) & organization(s)	0.6	1.9	2.8	0.5	0.0	0.1	0.0	0.0
male(s), female(s) & organizations	0.1	0.1	0.6	0.1	-	0.0	-	0.0
characteristics not noted**	0.0	0.1	0.2	0.0	-	0.0	-	0.0
Totals=	8.1%	23.2%	63.6%	3.6%	0.1%	1.0%	0.1%	0.3%
N	(1123)	(3206)	(8786)	(495)	(14)	(133)	(19)	(39)

*Note: Other calculations indicate that of the total of 39 cases where the characteristics of the plaintiff(s) are not known definitively, three cases have at least one female as a plaintiff and 27 have at least one male as a plaintiff.

**Note: Other calculations indicate that of the total of 44 cases where the characteristics of the defendant(s) are not known definitively, four cases have at least one female as a defendant and 17 have at least one male as a defendant.

The first notable finding in Table 1A is the overwhelming discrepancy between males and females as objects of actions. We see that women comprise no more than 8.2% of defendants with respect to any type or combination of types of plaintiffs. Most typically here, it is men acting alone who are the plaintiffs. In contrast, men are the object of actions by a greater variety of types of plaintiff. For example, the category of females alone suing men alone account for almost 2/3 of the cases under that heading. In general, there is little variation in these patterns across the various types of plaintiffs. There is a small tendency for organizations, acting alone or in concert with individuals, to sue other organizations more often, but the differences are minor. Rather, the distributions indicate a pervasive pattern of defendant characteristics with little impact by the personal characteristics of plaintiffs.

Thus we might tentatively conclude that men and women as plaintiffs do not differ noticeably in their choice of targets - each category tend to sue men first, and organizations second. Women as objects of suits are well down the list for each.

This consistency of behaviour is more clearly shown in Table 1B. It shows each category as a percentage of the total number of cases, thus showing the relative incidence of a particular type of suit. For instance, the modal type of suit, an organization suing a male or males, accounts for 37.7% of all sampled actions. In contrast, the category of organizations suing women accounts for only 3.7%, only 1/10 the male total.

The type of action in which men sue women (1.9% of the total) and women sue men (5.2% of the total) are thus seen to be a relatively minor part of the civil court load. Rather, in terms of incidence of suit types, we have the following rank ordering of types:

1.	Organization(s) sues Male(s)	37.7%
2.	Male(s) sues Male(s)	13.6
3.	Organization(s) sues Organization(s)	12.6

4.	Organization(s) sues Males(s) & Female(s)	5.8%
5.	Female(s) sues Male(s)	5.2
6.	Male(s) sues Organization(s)	3.8
7.	Organization(s) sues Female(s)	3.7
8.	Organization(s) sues Male(s) & Organization(s)	2.8
9.	All other, each less than 2%	14.8
		100.0%

One must move down to the fourth type in terms of incidence before one encounters women litigants at all (or put another way, 63.9% of cases have been passed over), and then only as co-defendants with men. This finding simply reinforces the view that women rarely frequent the civil courts of Canada as civil litigants (except in divorce, probate, and provincial family court matters, none of which were covered in this special survey).

In Table 1C, figures are presented for only those cases in which no organization was involved. That is to say that we are here only looking at cases in which individual males and females brought actions against individual males and females. This type of case is relatively uncommon. Only 3,603 (or about 26%) of the total of 13,815 cases sampled met these specifications.

As may be seen in the distribution on Table 1C, the patterns of defendant sex characteristics do differ by the sex of the plaintiff but not strikingly so. Males do tend to bring actions against females more often than do other females (11.1% of cases as opposed to only 6.7%); and females bring actions against males slightly more often than against other females (82% as opposed to 79.3%). But by no stretch of the imagination are the civil courts a battleground between the sexes. Generally speaking, at least in this particular type of action, men and women appear not to behave in grossly different ways. Other factors,

such as jurisdiction, are much more helpful in explaining the patterns encountered.

TABLE 1C.

THE STRUCTURE OF PARTIES IN CASES INVOLVING ONLY PERSONS

(26% of the total sample)

(percentage distribution)

Defendants	Plaintiffs: Females Only	Plaintiffs: Males & Females	Plaintiffs: Males Only
Females	6.7%	8.1%	11.1%
Males & Females	11.3	24.3	9.6
Males Only	82.0	67.6	79.3
TOTALS	100.0%	100.0%	100.0%
N	(882)	(345)	(2,376)

As in the case with most indexes of social activities in Canada, there are substantial inter-provincial differences in the patterning of suits. Tables 2A and 2B show respectively the characteristics of plaintiffs and defendants in the provinces.

In these tables, as in succeeding pairs of tables, the relationship is presented first with plaintiffs and then defendants. Thus each case has two guises: it will be considered both with the focus on the plaintiff and then on the defendant. The result is a series of "twinned" tables in each subject area.

Table 2A

CHARACTERISTICS OF PLAINTIFFS BY PROVINCE

(percentage distribution)

Characteristics of Plaintiffs	Province										
	Prince Edward Island	Nova Scotia	New Brunswick	Quebec	Manitoba	Saskat-chewan	Alberta	British Columbia	New-foundland	Yukon	N.W.T.
female(s) only	3.2	5.1%	3.5%	14.5%	8.8%	8.6%	8.7%	9.1%	3.3%	4.3%	1.6%
female(s) & male(s)	0.7	3.2	3.3	2.3	5.1	3.6	4.2	6.4	1.6	1.2	2.0
female(s) & organization(s)	-	0.1	-	0.1	0.3	0.1	0.2	0.1	-	-	-
male(s) only	22.2	14.4	19.1	31.2	25.0	26.3	25.4	20.8	15.4	25.7	16.6
male(s) & organization(s)	-	0.6	0.2	0.6	1.9	0.6	2.0	1.6	0.3	1.2	0.8
organization(s) only	73.9	76.4	73.7	50.8	58.7	60.2	58.7	61.5	79.3	67.2	78.6
male(s), female(s) & organization(s)	-	-	0.1	0.2	0.2	0.1	0.4	0.0	-	-	-
not known*	-	0.2	0.1	0.3	-	0.5	0.4	0.5	0.1	0.4	0.4
Totals	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
N=	(410)	(1201)	(1375)	(2472)	(971)	(1761)	(1946)	(2016)	(1159)	(257)	(247)

*Note: Other calculations indicate that of the total of 39 cases where the characteristics of the plaintiff(s) are not known definitively, three cases have at least one female as a plaintiff and 27 have at least one male as a plaintiff.

Table 2B

CHARACTERISTICS OF DEFENDANTS BY PROVINCE

(percentage distribution)

Characteristics of Defendants	Province										
	Prince Edward Island	Nova Scotia	New Brunswick	Quebec	Manitoba	Saskat-chewan	Alberta	British Columbia	New-foundland	Yukon	N.W.T.
female(s) only	5.1%	5.0%	6.5%	8.1%	7.7%	5.8%	4.8%	7.7%	4.4%	3.5%	6.1%
female(s) & male(s)	4.1	12.4	6.5	3.9	11.1	8.8	11.1	12.6	10.4	4.3	4.0
female(s) & organization(s)	-	0.2	0.1	0.1	0.1	0.4	0.6	0.4	-	1.2	1.6
male(s) only	78.9	60.0	71.5	61.5	56.3	62.6	49.9	45.2	70.7	49.0	48.2
male(s) & organization(s)	0.7	2.6	2.3	4.0	9.1	5.3	10.3	10.0	1.2	12.8	13.8
organization(s) only	11.2	19.2	12.7	21.6	15.4	15.3	22.3	20.5	12.9	26.1	25.5
male(s), female(s) & organization(s)	-	0.6	0.1	0.4	0.1	1.6	0.7	3.0	0.1	1.9	0.8
not known*	-	-	0.3	0.4	0.2	0.2	0.3	0.6	0.3	1.2	-
Totals	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%	100%
N=	(410)	(1201)	(1375)	(2472)	(971)	(1761)	(1946)	(2016)	(1159)	(257)	(247)

*Note: Other calculations indicate that of the total of 44 cases where the characteristics of the defendant(s) are not known definitively, four cases have at least one female as a defendant and 17 have at least one male as a defendant.

We find in Table 2A some quite pronounced differences between the provinces with respect to the proportion of suits brought by women alone. The range is between the high of 14.5% in Quebec to a low of 1.6% noted in the Northwest Territories. Thus, regionally, the less developed areas such as the Atlantic Provinces and the North have the lowest incidence of women plaintiffs, while the highest rates are found in more developed, urbanized, and industrialized regions such as Quebec and British Columbia. This finding would tend to suggest that women, alone, suing in their own right are more likely to be found in jurisdictions in which the cumulative effects of development are most pronounced.

When one considers the combination of cases in which women alone, or men and women together are plaintiffs, the regional differences are quite plain as is shown in the following distribution:

	Percentage of Cases with women plaintiffs, either alone or with males
Atlantic Provinces	
Newfoundland	4.9%
Prince Edward Island	3.9%
Nova Scotia	8.3%
New Brunswick	6.8%
Quebec	16.8%
Prairies	
Manitoba	13.9%
Saskatchewan	12.2%
Alberta	12.9%
British Columbia	15.5%
The North	
Northwest Territories	3.6%
Yukon	5.5%

We cannot move confidently on factual grounds to explanations for variations of this magnitude aside from the highly tentative suggestion that urbanization (or associated phenomena) is affecting the proportion of female plaintiffs. There are two potential factors which may be at work here. One has to do with the opportunities or necessities to litigate; it is quite plausible to expect these to be greater in developed regions where there is greater commercial activity and greater incidence of contractually-based social relations. The other factor could be the greater inclination of females in developed, urban areas to resort to legal action, regardless of the level of opportunity, compared with females in hinterland areas. We also suggest this would be the order of relative importance of these two factors. In addition, though, we must look to institutional differences between the provincial court systems, and the types of conflicts likely to arise in an urban versus rural setting, for answers, a topic clearly beyond the scope of this study.

We must note as well that the relative size and composition of the other categories varies province to province to a considerable extent as well. For example, the proportion of males as plaintiffs ranges from a high of 31.2% in Quebec to a low of 14.4% in Nova Scotia; and the proportion of organizational plaintiffs from a high of 78.6% in the Northwest Territories to a low of 50.8% in Quebec. The only tentative conclusion we reach on the basis of these figures then, is that organizational suits are a dominant and continuing proportion of civil litigation across the jurisdictions, and that cases brought by individual men and women are much more variable.

Table 2B presents a corresponding view of the characteristics of defendants. In a sense, the pattern noted in Table 2A figures is repeated, but with the exception that individual males replace organizations in the dominant role, in this case as defendants. For example, the proportion of cases in which individual males are defendants ranges from a low of 45.2% in British Columbia to a high of 78.9% in Prince Edward Island.

Table 3A

CAUSE OF ACTION AND CHARACTERISTICS OF LITIGANTS

(percentage distribution)

Cause of Action	Characteristics of Plaintiffs							
	female(s) only	female(s) & male(s)	female(s) & organization(s)	male(s) only	male(s) & organization(s)	organization(s) only	male(s), female(s) & organization(s)	Unknown*
Contract & Property	27.9%	28.7%	38.5%	55.7%	54.9%	88.5	42.1%	58.9%
Traffic injury Torts	28.1	54.5	38.5	18.7	19.1	0.5	15.8	12.8
Other injury Torts	5.5	3.7	15.3	2.3	-	0.2	-	2.6
Non-injury Torts	9.7	7.6	-	15.6	16.8	1.7	5.3	10.3
Family	22.9	0.4	-	2.2	-	0.1	-	2.6
Statutory	2.3	0.2	-	1.0	0.8	4.8	-	-
All Others	3.6	4.9	7.7	4.5	8.4	4.2	36.8	12.8
Totals	100%	100%	100%	100%	100%	100%	100%	100%
N=	(1120)	(488)	(13)	(3195)	(131)	(8764)	(19)	(39)

*Note: Other calculations indicate that of the total of 39 cases where the characteristics of the plaintiff(s) are not known definitively, three cases have at least one female as a plaintiff and 27 have at least one male as a plaintiff.

Table 3B

(percentage distribution)

Cause of Action	Characteristics of Defendants							
	female(s) only	female(s) & male(s)	female(s) & organization(s)	male(s) only	male(s) & organization(s)	organization(s) only	male(s), female(s) & organization(s)	Unknown*
Contract & Property	71.7%	77.1%	58.6%	73.5%	53.9%	77.7%	83.7%	58.5%
Traffic injury Torts	8.4	13.5	14.6	9.3	24.6	1.5	8.5	22.0
Other injury Torts	0.6	0.7	4.9	0.8	2.9	2.7	0.8	-
Non-injury Torts	4.4	4.2	14.6	5.8	11.8	6.2	3.1	-
Family	7.4	0.4	2.4	3.2	0.1	0.1	-	2.4
Statutory	2.8	0.4	-	3.6	1.1	6.0	-	7.3
All others	5.3	3.7	4.9	3.8	5.6	5.8	3.9	9.8
Totals	100%	100%	100%	100%	100%	100%	100%	100%
N=	(870)	(1224)	(41)	(8115)	(825)	(2524)	(129)	(41)

*Note: Other calculations indicate that of the total of 44 cases where the characteristics of the defendant(s) are not known definitively, four cases have at least one female as a defendant and 17 have at least one male as a defendant.

The proportion of cases with individual female defendants varies from a high of 8.1% in Quebec to a low of 3.5% in the Yukon. The major proportion of the balance of defendants in each province is made up of organizations, though this proportion is clearly much smaller than was the case with distribution of plaintiffs ranging from a high of 26.1% of cases in the Yukon to a low of 11.2%.

Thus, as was the case with the characteristics of plaintiffs, the pattern of characteristics of defendants is fairly uniform across the various jurisdictions covered. Individual males bear the brunt of much civil litigation, followed by organizations, and individual females. Though there are notable differences, jurisdiction to jurisdiction, in distribution of both plaintiff and defendant characteristics, the overall pattern of a low level of litigation involving men is sustained. Within this pattern, there is an underlying variation by jurisdiction which we cannot explain with the data at hand. Much more detailed investigation of the specific ways in which the machinery of civil litigation works in each province or territory would be necessary before conclusions could be drawn in this regard.

We turn now to another central aspect of the study: the nature of the suits themselves as brought by various types of plaintiffs. Examination of the types of cases brought by women reveals immediately that the distribution is quite different from that for suits brought by men. In Table 3A, for instance, we see that contract and property cases account for about 56% of actions brought by men but only 28% of those brought by women. Cases brought by women tend more often to be concerned with injuries they have suffered. Most notable of these injury cases are those resulting from traffic accidents. Such cases account for about 28% of the total actions brought by women alone, and about 55% of the total of actions brought by men and women together. Males alone, however, brought this type of action to the extent of about 19% of the total of cases.

One prominent source of variation is the extent to which actions brought by women are concerned with matters of family law (excluding divorce). These comprise fully 22.9% of actions brought by female plaintiffs acting alone,

Table 4A

CHARACTERISTICS OF LITIGANTS AND LEVEL OF COURT

(percentage distribution)

Level of Court	Characteristics of Plaintiffs							
	female(s) only	female(s) & males	female(s) organization(s)	male(s) only	male(s) organization(s)	organization(s) only	female(s), male(s) & organization(s)	Unknown*
Small claims or debts	10.4%	4.8%	14.3%	16.3%	7.5%	22.5%	-	25.6%
County or district	15.2	11.9	14.3	35.9	31.6	48.5	42.1%	28.2
High, supreme, or queen's bench	69.2	78.8	64.3	39.0	33.1	25.4	36.8	30.8
Appeal court	5.9	9.5	7.1	8.8	27.8	3.6	21.1	15.4
Totals	100%	100%	100%	100%	100%	100%	100%	100%
N=	(1123)	(495)	(14)	(3206)	(133)	(8786)	(19)	(39)

*Note: Other calculations indicate that of the total of 39 cases where the characteristics of the plaintiff(s) are not known definitively, three cases have at least one female as a plaintiff and 27 have at least one male as a plaintiff.

Table 4B

CHARACTERISTICS OF LITIGANTS AND LEVEL OF COURT

(percentage distribution)

Level of Court	Characteristics of Defendants							
	female(s) only	female(s) & male(s)	female(s) organization(s)	male(s) only	male(s) & organization(s)	organization(s) only	female(s), male(s) & organization(s)	Unknown*
Small claims of debts	31.5%	10.4%	9.8%	23.6%	6.3%	10.4%	2.3%	31.8%
County or district	33.9	37.9	36.6	45.7	25.7	38.0	13.2	29.5
High, supreme, or queen's bench	28.2	47.2	43.8	27.5	58.1	40.3	81.4	27.3
Appeal court	6.4	4.5	9.8	3.2	9.9	11.3	3.1	11.4
Totals	100%	100%	100%	100%	100%	100%	100%	100%
N=	(872)	(1226)	(41)	(8145)	(828)	(2530)	(129)	(44)

*Note: Other calculations indicate that of the total of 44 cases where the characteristics of the defendant(s) are not known definitively, four cases have at least one female as a defendant and 17 have at least one male as a defendant.

but only 2.2% of actions brought by men. The almost total absence of family-related cases for any other type of plaintiff than women acting in their own right strongly suggests that women plaintiffs are associated with different types of cases, prodominantly ones where their grievance is rooted in physical damage or economic and social vulnerability stemming from marital discord.

With respect to the characteristics of defendants and the kinds of cases brought against them, we see in Table 3B that there are a few differences in the types of cases brought. For example, taking the three single types -- women, men and organizations -- we find that in each category, the proportion of cases in which they are defendants for contract and property matters is relatively constant (71.1%, 77.1%, and 77.7% respectively). In mixed types of defendant parties there is a heavier incidence of torts, perhaps reflecting the presence of insurance companies as co-defendants. Women are also marginally more often found as defendants in family-related cases (7.4% of the total as opposed to 3.2% of cases against male plaintiffs. Generally, the distribution in Table 3B indicates that men and women find themselves defendants proportionately in about the same sorts of cases, except that as we have previously noted, women are found in this role much less often than men.

Much more clearcut differences are presented in Tables 4A and 4B. These deal with the level of court in which the sample action was pursued. Dealing first with the characteristics of plaintiffs in Table 4A, we see that the cases brought by women are much more likely to be heard at the Supreme Court level, these are, by implication, cases of a considerably more serious nature.

For example, in seven of every ten cases in which the plaintiff was a woman, the case was heard at the Supreme Court level, in contrast to only four of every ten cases brought by men. This difference is continued through the hybrid plaintiff types. For example, when men and women together brought a case, in 73.8% of the cases it was at the Supreme Court level, as were 64.3% of cases brought by a woman and an organization. In contrast, when men and organizations brought cases, only 33.1% of these were at the Supreme Court level, and only 25.4% of cases brought by organizations alone were at this level of court.

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Much more clearcut differences are presented in Tables 4A and 4B. These deal with the level of court in which the sample action was pursued. Dealing first with the characteristics of plaintiffs in Table 4A, we see that the cases brought by women are much more likely to be heard at the Supreme Court level, these are, by implication, cases of a considerably more serious nature.

For example, in seven of every ten cases in which the plaintiff was a woman, the case was heard at the Supreme Court level, in contrast to only four of every ten cases brought by men. This difference is continued through the hybrid plaintiff types. For example, when men and women together brought a case, in 73.8% of the cases it was at the Supreme Court level, as were 64.3% of cases brought by a woman and an organization. In contrast, when men and organizations brought cases, only 33.1% of these were at the Supreme Court level, and only 25.4% of cases brought by organizations alone were at this level of court.

There were small compensating increases in the proportion of cases brought by men and organizations (16.3% and 22.5% respectively) at the small claims court level in contrast to only 10.4% of cases brought by women. But the mass of the difference lies in the distinct underrepresentation of women as plaintiffs at the County or District court level. The reasons for these differences must lie in the nature of the cases brought and their requisite place in the court hierarchy. It must be the case that actions typically brought by women are more often properly or necessarily heard at the Supreme Court level.

We must also note that survey findings show women appeal decisions less often than any other type of plaintiff save organizations. Thus a smaller proportion of cases with women as plaintiffs were found at the appeal court level. For example, only 5.2% of cases brought by women were noted at the appeal court level in contrast to 8.8% of cases brought by men. Other figures not shown here indicate that male plaintiffs appeal 9.3% of decided cases as opposed to only 6.0% for females. This finding might indicate either a higher rate of initial success for women, or a lesser inclination to appeal an unfavourable verdict.

In contrast to the distributions of the various types of plaintiffs with respect to the level of court, the equivalent distribution of types of defendants is quite different as is shown in Table 4B.

Here female defendants are moderately overrepresented at the small claims courts level, perhaps thus giving support to the view that women, as lesser creditors, are sued for smaller amounts defaulted debts, or more likely, not sued at all. For instance, 31.5% of the cases in which the defendant was female were heard in small claims court in contrast to a figure of 23.6% for male defendants. Men were more likely, as defendants, to have their cases heard at the county or district court level. It is only when women are jointed as defendants by organizations that a significant jump in the proportion of cases heard at the Supreme Court level occurred. In contrast to the situation of women as plaintiffs appealing decisions less often than men, women as defendants appeal more frequently than men (6.4% to 3.2%).

On the whole, these results suggest that the amount of claim against women defendants tends as a rule to be lower than against men. Difficulties in data collection on the amount claimed prevent from examining this possibility more thoroughly.

In Table 4C, a breakdown of case types is given for only those cases in which there was at least one human plaintiff, by level of court. This form of display helps to clarify the evident interaction of type of case and court level in the differing patterns of cases initiated by male and female plaintiffs. It may be seen in Table 4C that at the small claims court level there are essentially no differences between men and women as to the type of case brought.

Only at the county court level and above do the differences in litigational patterns we have noted come into play. These differences appear primarily to be the product of women bringing far more family-related cases than men, and fewer contract and property cases. For example, at the county or district court level, only women brought family-related cases (though these were admittedly very few in number). In addition, they brought markedly fewer contract and property cases (47.8% of the total brought by females only in contrast to 70.7% brought by males alone), and slightly more non-injury torts, and traffic accident injury torts.

At the supreme court level, these differences increase dramatically. Nearly one-third of the cases brought by women at the supreme court level were concerned with family matters in contrast to only 4.7% of cases brought there by male plaintiffs. Similarly, men brought more than twice as many contract and property cases as a proportion than women (38.9% of the total for men as opposed to 16.9% of the total for women alone). The same basic pattern is noted at the appeal court level too.

These findings lead us to the view that the participation of women in the civil justice process is heavily weighted by a relative preponderance of family cases, and is thus an adjunct to the kinds of proceeedings normally heard in the course of divorce actions in Provincial supreme courts. These adjunct actions would be based on provincial legislation, designed specifically to protect the rights of wives and dependent children which, it appears, is constructed for the purpose of ensuring that the errant husband and not the state must bear the household-related cost of separation and/or desertion. Thus, in essence, the fiscal interests of the state itself are being safeguarded by this type of action.

This view lends weight to the interpretation that civil law affords special protection to women in some limited areas such as family-related cases, where the public purse stands to suffer, but that generally, under-protection of women as a class is the norm. We will explore this view more fully in connection with the matter of divorce as a special form of civil litigation in a later section, and in our concluding remarks.

The Natural History of Civil Actions

Not all civil disputes are brought to court for formal adjudication and similarly, not all those brought to court are carried through every step to a judicial decision. Likewise, some others are carried beyond a judicial decision through appeal proceedings. More than a few disputants--indeed, the majority--reach a settlement informally while court proceedings are in abeyance, thereby terminating the action.

Obvious though the observation may be, we reiterate that people and organizations go to court for a variety of subjective reasons over and above the objective reasons cited as "causes of actions". In fact, the filing of a suit in numerous instances may not be indicative of

irresolvable differences between the parties at all. Many go because they must: not to go would mean accepting a consequential material loss. Others go rather out of choice than out of necessity, however, either because they wish to have some violated principle upheld, or as a means of applying pressure in the marketplace game of bluff and counter-bluff--initiating legal proceedings with the implied threat of enforcement to overcome the intransigence of another party. This line of reasoning suggests that the initiation and conduct of litigation is an activity of considerably variety, perhaps comprising different modes of litigious behaviour manifested in different kinds of cases and by different types of litigants. By extension, each of these patterns may have a typical "natural history". One important feature of the natural history of cases would be the point in civil proceedings at which the action is terminated or ceases to move forward. Tables 5A and 5B present information pertinent to this.

Considering first the characteristics of plaintiffs in Table 5A, we note few large differences between the types of plaintiffs in the course the actions followed. Adding together the 'judgement issued' and 'final enforcement' categories, though, we find that women persist in their actions to this stage slightly less often than men (12.2% of cases compared to 16.8% of cases for men alone) and both do less well than organizations alone (22.1% of cases at this stage). Disregarding the proportion of cases in which a notice of appeal was filed, it seems to be the case that suits brought by women are slightly less likely to reach the trial, judgment, or enforcement stage than is the case for actions brought by men or by organizations.

TABLE 4C

CAUSE OF ACTION BY LEVEL OF COURT AND SEX OF PLAINTIFF

(Percentage Distribution)

CAUSE OF ACTION	Small Claims & Debts Courts			County & District Courts			High, Supreme or Queen's Bench Courts			Appeal Courts		
	Females Only	Males & Females	Males Only	Females Only	Males & Females	Males Only	Females Only	Males & Females	Males Only	Females Only	Males & Females	Males Only
Contract & Property	72.6%	79.1%	73.7%	47.8%	53.5%	70.7%	16.9%	20.9%	38.9%	27.6%	31.9%	34.7%
Traffic Injury Torts	0.9	--	3.3	10.1	19.0	3.1	36.2	65.3	38.2	25.9	42.5	24.6
Other Injury Torts	--	--	--	3.6	1.7	0.6	6.8	4.2	3.9	5.2	4.3	6.4
Non-Injury Torts	22.2	16.7	20.1	30.7	24.1	23.6	3.9	4.5	8.4	1.7	6.4	6.8
Family	--	--	--	3.6	--	--	30.5	0.3	4.7	22.4	2.1	4.3
Statutory	--	--	--	0.6	--	0.2	2.7	0.3	0.6	6.9	--	8.2
All Other	4.3	4.2	2.9	3.6	1.7	1.8	3.0	4.5	5.3	10.3	12.8	15.0
TOTALS	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
	(117)	(24)	(522)	(169)	(58)	(1,148)	(776)	(359)	(1,245)	(58)	(47)	(280)

Table 5A

THE NATURAL HISTORY OF CIVIL SUITS
(percentage distribution)

Termination of Action at:	Characteristics of Plintiffs							
	Female(s) only	Female(s) & Male(s)	Females(s) & organization(s)	Male(s) only	Male(s) & organization(s)	organization(s) only	Male(s) Female(s) & organization(s)	not known*
Originating process	13.3%	10.7%	14.3%	13.8%	10.5%	15.4%	10.5%	12.8%
Service	4.6	3.6	--	5.9	3.0	9.5	5.3	5.1
Appearance	1.5	2.2	7.1	2.2	--	1.3	5.3	--
Statement of Claim	4.3	1.4	7.1	1.6	0.8	1.1	--	--
Statement of Defence	3.9	3.6	--	4.2	3.8	2.4	5.3	--
Counterclaim	0.2	0.2	--	0.8	--	0.4	5.3	--
Discovery	1.8	1.6	--	1.1	0.8	0.3	--	--
Notice of Trial	1.8	2.4	--	1.6	0.8	0.4	--	--
Pretrial Remedy	48.8	50.6	50.0	42.2	39.0	43.3	15.8	41.0
Start of Trial	1.5	0.2	--	0.6	--	0.1	--	2.6
Completion of Trial	0.1	--	--	0.1	--	--	--	--
Judgement Issued	6.1	7.5	14.3	5.6	3.8	1.0	10.5	--
Final Enforcement	6.1	5.9	--	11.2	9.0	21.2	21.0	23.1
Notice of Appeal	6.0	10.1	7.1	9.3	28.5	3.7	21.0	15.4
Totals	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
N =	(1123)	(495)	(14)	(3206)	(133)	(8786)	(19)	(39)

*Note: Other calculations indicate that of the total of 39 causes where the characteristics of the plaintiff(s) are not known definitevely, three cases have at least one female as a plaintiff and 27 have at least one male as a plaintiff.

Table 5B

THE NATURAL HISTORY OF CIVIL SUITS

(percentage distribution)

Termination of Action at:	Characteristics of Defendants							
	Female(s) Only	Female(s) & Male(s)	Female(s) & Organization(s)	Male(s) Only	Male(s) & Organization(s)	Organization(s) Only	Male(s) Female(s) & Organization(s)	Not Known *
Originating Process	15.6%	13.2%	7.3%	16.6%	10.4%	10.3%	7.0%	25.0%
Service	10.6	7.1	4.9	9.3	3.4	5.1	3.9	2.3
Appearance	1.4	2.0	4.9	1.3	2.1	2.1	1.6	--
Statement of Claim	1.0	1.2	2.4	1.5	1.1	1.9	3.9	4.5
Statement of Defence	2.5	2.4	4.9	2.4	5.3	4.5	2.3	--
Counterclaim	0.9	0.2	2.4	0.4	0.8	0.5	--	--
Discovery	--	0.4	7.3	0.5	1.1	1.0	1.6	4.5
Notice of Trial	0.8	0.8	2.4	0.8	1.9	0.8	0.8	--
Pretrial Remedy	46.1	46.7	39.0	43.0	44.3	42.1	65.1	34.1
Start of Trial	0.5	0.3	--	0.2	0.5	0.7	0.8	--
Completion of Trial	0.3	--	--	--	--	--	--	--
Judgement Issued	1.9	2.4	4.9	2.2	5.3	4.1	1.6	2.3
Final Enforcement	11.9	18.4	9.8	18.4	13.2	15.0	8.5	15.9
Notice of Appeal	6.4	4.8	9.8	3.4	10.6	11.9	3.1	11.4
Totals	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%	100.0%
N =	(872)	(1226)	(41)	(8145)	(828)	(2530)	(129)	(44)

*Note: Other calculations indicate that of the total of 44 cases where the characteristics of the defendant(s) are not known definitively, four cases have at leat one female as a defendant and 17 have at least one male as a defendant.

Looking at the experience of defendants in Table 5B, a somewhat similar pattern emerges. We note, for instance, that only 13.8% of cases brought against women terminate at the 'judgement issued' or 'final enforcement' stage, in contrast to 20.6% of cases brought against men and 19.1% of cases brought against organizations.

In neither case (Table 5A or 5B) is there a presumption of "success" on the part of either the plaintiff or the defendant. Rather, we are only examining that proportion of cases which end at that particularly decisive stage of the process - and it does appear that suits by or against women are slightly less likely to make it to definitive completion than are suits brought by or against men or organizations.

We can offer no ready explanation why this result should emerge. The only inference to be drawn however is that suits involving women are, for whatever reason, settled or discontinued at a pretrial stage somewhat more often. Whether this is a result of an unwillingness to proceed or an acknowledgement of a low or high probability of success on the part of defendants or plaintiffs is an open question, one which we cannot answer.

One factor which has been suggested to account for the differentiation of men and women in civil litigation is the presence or absence of, and differential content in, legal advice. While we cannot go into the latter hypothesis, we can examine the presence or absence of counsel. In Table 6A, we can look at the nature of legal representation in cases involving the different categories of plaintiffs we have been examining.

Table 6A

Legal Representation of Civil Litigants

(percentage distribution)

Legal Representation for:	Characteristics of Plaintiffs							
	female(s) only	female(s) & male(s)	female(s) & organization(s)	male(s) only	male(s) & organization(s)	organization(s) only	female(s) & male(s) & organization(s)	Unknown*
Neither party	8.9%	3.8%	14.3%	10.4%	7.5%	13.8%	-	12.8%
Plaintiff only	35.9	28.1	14.3	42.9	31.6	67.5	42.1%	53.9
Defendant only	0.6	0.2	-	0.9	-	0.2	-	-
Both parties	54.6	67.9	71.4	45.8	60.9	18.5	57.9	33.3
Totals=	100%	100%	100%	100%	100%	100%	100%	100%
N=	(1123)	(495)	(14)	(3206)	(133)	(8786)	(19)	(39)

*Note: Other calculations indicate that of the total of 39 cases where the characteristics of the plaintiff(s) are not known definitively, three cases have at least one female as a plaintiff and 27 have at least one male as a plaintiff.

Table 6B

Legal Representation of Civil Litigants

(percentage distribution)

Legal Representation for:	Characteristics of Defendants							
	female(s) only	female(s) & male(s)	female(s) & organization(s)	male(s) only	male(s) & organization(s)	organization(s) only	female(s) & male(s) & organization(s)	Unknown*
Neither party	21.9%	7.2%	2.4%	13.9%	4.2%	8.8%	-	22.7%
Plaintiff only	51.8	63.3	31.7	63.4	38.8	44.8	33.3%	43.2
Defendant only	0.3	0.6	-	0.3	1.0	0.5	0.8	-
Both parties	26.0	28.9	65.9	22.4	56.0	45.9	65.9	34.1
Totals=	100%	100%	100%	100%	100%	100%	100%	100%
N=	(872)	(1226)	(41)	(8145)	(828)	(2530)	(129)	(44)

*Note: Other calculations indicate that of the total of 44 cases where the characteristics of the defendant(s) are not known definitively, four cases have at least one female as a defendant and 17 have at least one male as a defendant.

We see, first of all in cases brought by women only, that legal representation was present in 90.5% of the cases. The counterpart figure for male-only plaintiffs is 88.7% and for organizations it is 86.0% - an insignificant difference. Thus, it is certainly the case that women acting as plaintiff are no more nor less likely to have legal representation. When they are joined by co-plaintiffs, the proportion of cases involving legal representation goes up. So it is reasonable to discard the notion that differential patterns of civil suits, as between men and women, are somehow due to the absence of counsel for women plaintiffs.

What we do note, however, is that in cases brought by women, the proportion of cases in which the defendant they oppose is unrepresented is modestly lower than average. For example, the proportion of cases where the plaintiff but not the defendant has legal representation is only 35.9% for women alone, but 42.9% for men alone, and fully 67.5% for organizations alone. This may be due to the distinctive patterns for women of case type and court level discussed previously.

Thus there seems to be a lower incidence of what might be termed "asymmetric representation" in cases brought by women plaintiffs. Why this should be is an open question as well, but asymmetry of representation may reflect asymmetry of seriousness: more defendants facing male plaintiffs or organizations may consider the case not serious enough to warrant engaging counsel. The higher proportion of female plaintiff cases in which the defendant hires legal counsel may indicate that these cases are more serious for some reason; this in turn could indicate that females are more conservative in starting litigation, doing so only with very good cause.

Turning to Table 6B and the matter of legal representation for defendants, there is a clear pattern: in only 26.3% of cases where females were solo defendants did those defendants have legal representation. The equivalent figure for male defendants is even lower at 22.7% but for organizations it was 46.4%.

Thus in the matter of presenting a "prepared defence", organizations clearly take a greater interest. Looking at the combined category of cases where neither party had legal representation, and cases where only the plaintiff had such advice, we see 73.7% of cases where females only were the defendants. The figure for men alone was 77.3%; but for organizations, only 53.6%. We must reiterate, however, that the quality of advice given is only hypothetically a constant, and could well vary considerably.

Lastly, we come to a consideration of success by types of plaintiffs: the achievement of victory, as here measured by the proportion of award to claim. This is only a rough measure of success at best but it is nevertheless important, and it is here in Table 7A that we find striking differences related to the characteristics of the plaintiffs.

Looking at the highest measure of "success", an award in excess of three-quarters of the claim, we find only 13.3% of cases brought by women alone. But for cases brought by men alone, the figure was more than double, 26.9%; and for organizations alone, fully 49.9%! In cases brought by men and women co-plaintiffs the proportion was 18.8% (higher than in cases with solo women plaintiffs).

Table 7A

Success In Gaining Awards and Characteristics of Litigants: Part 1

(percentage distribution)

Proportion of Awards to Claim	Characteristics of Plaintiffs							
	Female(s) only	Female(s) & male(s)	Female(s) & organization(s)	male(s) only	male(s) & organization(s)	organization(s) only	male(s), female(s) & organization(s)	Unknown*
No award registered	81.0%	72.3%	92.9%	68.0%	66.2%	48.4%	57.9%	53.8%
Up to one half of claim	4.5	6.9	--	3.2	4.5	0.7	15.8	5.1
One half to three-quarters of claim	1.2	2.0	--	1.9	4.5	1.0	10.5	2.6
In excess of three-quarters of claim	13.3	18.8	7.1	26.9	24.8	49.9	15.8	38.5
Totals:	100%	100%	100%	100%	100%	100%	100%	100%
N =	(1123)	(495)	(14)	(3206)	(133)	(8786)	(19)	(39)

*Note: Other calculations indicate that of the total of 39 cases where the characteristics of the plaintiff(s) are not known definitively, three cases have at least one female as a plaintiff and 27 have at least one male as a plaintiff.

Table 7B

Success In Gaining Awards and Characteristics of Litigants: Part 2

(percentage distribution)

Proportion of Awards to Claim	Characteristics of Defendants							
	Female(s) only	Female(s) & male(s)	Female(s) & organization(s)	male(s) only	male(s) & organization(s)	organization(s) only	male(s), female(s) & organization(s)	Unknown*
No award registered	63.0%	59.7%	68.2%	52.1%	70.1%	61.6%	87.6%	59.1%
Up to one half of claim	1.3	1.1	4.9	1.7	4.3	2.2	0.8	--
One half to three-quarters of claim	1.0	1.1	4.9	1.4	1.0	1.3	--	2.3
In excess of three-quarters of claim	34.7	38.1	22.0	44.8	24.6	34.9	11.6	38.6
Totals:	100%	100%	100%	100%	100%	100%	100%	100%
N =	(872)	(1226)	(41)	(8145)	(828)	(2530)	(129)	(44)

*Note: Other calculations indicate that of the total of 44 cases where the characteristics of the defendant(s) are not known definitively, four cases have at least one female as a defendant and 17 have at least one male as a defendant.

Female and organizational co-plaintiffs fare least well of all (7.1% in the highest award category). At the other end of the "success" scale - no award registered at all - we find 81.0% of cases brought by female plaintiffs, but only 68.0% of cases brought by males alone, and 48.4% of cases brought by organizations alone. These differences are of major proportions and indicate substantially different probabilities of success for male, female, and organizational plaintiffs - differences which have no counterpart in the experience of defendants as shown in Table 7B. This finding is astonishing and may also make problematic both the fact of the less asymmetric use of legal representation by women plaintiffs along with the possible explanations we advanced for that fact. A partial explanation might be found in the fact that one of the types of case typical of women is domestic matters; for such cases, favorable judgements are not frequent.

For defendants, "no award registered" must be considered success. But in this respect, the various types of defendants fare much more equally. Thus, while women plaintiffs fare much less well than their male counterparts, women defendants do just about as well as their counterparts. No award was registered for 63.0% of cases involving women defendants, only slightly more than the 61.6% of organizational defendants, and 52.1% of male defendants. Males do have major awards given against them more often (44.8% of males incur awards in excess of three-quarters of the claim as opposed to only 34.7% of women and 34.9% of organizations) but the differences are much less startling than was the case with the typology of plaintiffs.

Thus, overall, women fail in civil litigation both as plaintiffs and as defendants more frequently than men, and much more frequently

than organizations, in spite of an equal or better incidence of legal representation. Perhaps this is a result of the slightly different nature of the cases brought, or some other undiscovered factors we have not examined. But for whatever reason, the lesson seems obvious that whether a litigant is male or female in Canadian civil litigation does matter in some degree both in respect to the likely outcome, and with respect to what transpires by way of the process leading up to that outcome.

Divorce - A Special Case

The nature of divorce actions is sufficiently different from other forms of civil actions as to set them completely apart. Firstly, they are presently mounted on the basis of a federal statute, the Divorce Act of 1968, which sets forth specific terms and conditions for the granting of a divorce, unlike civil actions generally, which tend in contrast to be based on the merits of a particular set of circumstances. Secondly, the action seeks the dissolution of a civil contract (a marriage). The legal form of that contract exists under provincial statutes and has little to do with federal jurisdiction or with whatever religious or ethical observances the signing of the original contract (i.e., marriage) may have had appended to it. Divorce in this context is thus more in the line of a settling of accounts, a social bankruptcy as it were.

Further, since most requests for divorce are acceded to (well in excess of 90%), one cannot examine factors which contribute to "winning" or "losing" as with ordinary civil actions. In divorce actions, the only analogue to winning and losing lies in

the financial terms of settlement (which are heavily influenced by provincial family law), and in the awarding of child custody. Even in the latter case, though, both spouses may perceive themselves as "winning" or "losing" since they may not share a common view as to the merit of having custody.

In the data accumulated by the Central Divorce Registry, there is no material on the former question of financial idemnities at all, but there is material pertinent to the question of custody awards.

Thus, while the outcome (the granting of a divorce) is seldom in doubt, it is in the legal grounds cited to establish the legitimacy of a request for divorce, in the terms and conditions of settlement involved, and in the legal roles played out that we see the differences between men and women.

We have argued in a previous section that domestic matters is one of the few areas of civil law in which women are accorded special treatment, de facto if not de jure, possibly in an attempt to protect the public purse from having to bear the direct costs of family breakdown. The access to alimony under the Divorce Act, and the emphasis on the allegation of "marital offences" suggest a built-in capability for providing remedies for "wronged" women. The rhetoric of rights and wrongs in the behavioural imagery of the Divorce Act is, on the face of it, much more concerned with behaviour than with the viability of a structure, a marriage-based family.

Predominantly, misbehaviour constitutes the legitimate ground for the dissolution of a marriage qua contract. The structural

condition of marriage breakdown was added to the list of grounds in the 1968 Act and it has enjoyed considerable usage as a basis for petitions since then, thus moderating the insistence on the establishment of fault. But whether for reasons of expediency or strategic advantage, the matrimonial offence grounds mentioned by the Divorce Act are as a group still widely employed, despite the addition of marriage breakdown grounds such as separation*.

In practice, though, these grounds are best seen as portals through while a dissolution of contract can proceed - not causes of the desire for dissolution. For example, the citation of adultery as a legal ground may or may not reflect the social reason why the marriage was deemed to be unsalvageable. A divorce action is therefore not properly seen as the high point in an inter-spousal conflict but rather as the legitimation of the status quo - a broken marriage. Thus divorce actions are highly ritualized in much the same manner as a funeral. The real conflict, and the expiry of the union, has already taken place before the action reaches court except in the very small proportion of cases which are contested. Even here, the contest is seldom over the divorce itself, but rather over ancillary issues such as custody. Only the details need be settled and the judicial sanction given. Even the settlement of issues is now routinely worked out by the lawyers prior to the court appearance, frequently leaving the judge without much of a significant role to play. This latter situation raises serious questions as to the usefulness of having divorce actions heard in a general court at all. These differences between divorce

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* The allowable grounds currently permissable are: adultery, sodomy, bestiality, rape, homesexual act, form of marriage with another, physical cruelty, mental cruelty, imprisonment, alcohol or narcotic addiction, whereabouts of spouse unknown, nonconsummation, separation for 3 years, and desertion.

actions and other civil actions notwithstanding, there are many ways in which these two types are legally comparable. Most important of all, however, is that divorce cases bring more women into Canadian courtrooms than any other cause, be it civil or criminal. With these thoughts in mind, we will now examine the patterns of men and women divorcing in Canada.

In Table 8 we see the legal grounds which men and women choose to use in their (overwhelmingly successful) attempts to obtain a divorce. The first and most important aspect to note is that, as expected, it is predominantly women who petition (about 2/3 of all cases), thus adopting the role of the wounded or offended party. This finding could well reflect a utilitarian judgement that it is more efficacious to have the wife petition, but for whatever reason, the wife is more likely to appear in the role of aggrieved party.

Also to be seen is that the grounds cited by women tend to be observably different than those cited by men. For both men and women the category of grounds most often cited is non-cohabitation (comprised of separation, desertion and whereabouts of spouse unknown) but whereas 50% of male petitioners use these grounds, only 38.2% of the female petitioners use it. Men are more often found to use adultery alone (36.1% to 27.0% of women); but are much less likely to use mental and physical cruelty (3.0% to 15.5% of women). Other grounds are seldom used by either sex.

It is thus the case that cruelty, either mental or physical, is the foremost source of variation on the differential use of grounds cited for divorce by men and women. Women tend to cite it much more

Table 8

Canadian Divorce Actions 1969-1977:

Grounds Cited in Divorce Actions by Sex of Petitioner

Grounds Cited	Sex of Petitioner	
	Male	Female
Mental Cruelty only	1.9%	1.9%
Physical Cruelty only	0.1	0.1
Subsequent Marriage only	0.0	0.0
Adultery only	36.1	27.0
Sexual Offence	0.1	0.1
Nonconsumation	0.3	0.2
Noncohabitation* only	50.0	38.2
Addiction only	0.2	0.5
Prison only	0.0	0.1
Noncohabitation plus adultery	2.6	1.5
Noncohabitation plus mental cruelty	0.4	0.3
Noncohabitation plus physical cruelty	0.0	0.2
Adultery plus mental cruelty	1.6	1.5
Adultery plus physical cruelty	0.0	0.2
Mental and Physical cruelty	3.0	15.5
Noncohabitation, adultery, and mental cruelty	0.1	0.1
Noncohabitation, adultery, and physical cruelty	0.0	0.0
Noncohabitation, mental and physical cruelty	0.5	1.3
Adultery, mental and physical cruelty	1.8	5.3
Noncohabitation, adultery, mental and physical cruelty	0.1	0.3
All other combinations	1.2	5.1
Totals:	100%	100%
N =	(132222)	(250580)

* Non-cohabitation is comprised of separation, desertion and whereabouts spouse unknown.

often proportionately than men, and thus they make use of the other grounds less often. Given the desire to divorce, citing cruelty is preferable to citing non-cohabitation in that there is no mandatory three year waiting period as is the case with separation. Thus men who wish a divorce might well encourage an action by their wives on a simple fault ground in the interest of speed. Expeditious settlement of a case though, is particularly dependent on the prior settlement by private agreement of ancillary issues such as child custody, financial support, and division of property.

As an aside, the effects of the presence of children on the duration of a divorce action may be seen graphically in Table 9. Here, it seems not to matter what sex the petitioner is nearly so much as whether there are children. When there are none, about 75% of cases result in the issuance of a decree nisi in less than six months, whereas when there are children, only about 60% of cases are settled in this time period. Even so, about 90% of all cases result in a decree nisi within a year from filing; and there thus appears to be a certain expeditiousness of divorce actions in contrast to the general run of civil cases previously discussed.

This could be the result of the highly ritualized nature of divorce cases. The outcome is generally known in advance, and private pre-trial settlement of issues in the norm. It could also be that there is relatively little work to be done in court. Establishing the fact of a marital offence is not difficult, especially when the "offender" cooperates, in the interests of a quick resolution, by not contesting. Only when child custody or financial settlements are in dispute would a case tend to drag on -

Table 9

Duration of Divorce Proceedings by Sex of Petitioner and Presence or Absence of Children

(percentage distribution)

Duration of Proceedings to Decree Nisi	Sex of Petitioner			
	Male		Female	
	No children	At least one child	No children	At least one child
3 months or less	43.6%	27.4%	45.3%	29.8%
4 to 6 months	29.5	31.1	29.1	31.8
7 to 12 months	19.4	28.5	19.3	27.8
13 to 18 months	4.5	7.7	3.9	6.6
19 to 24 months	1.5	2.8	1.3	2.3
2 years or more	1.5	2.5	1.1	1.7
Totals:	100%	100%	100%	100%
N =	(65910)	(56455)	(89953)	(138615)

and we note from figures not presented here that in only about 12% of cases did the respondent (the offending party) even bother to file a response.

Because we do not have figures on financial settlements, we do not know what form private accommodations might take. But with respect to child custody, it is abundantly clear, as is shown in Table 10, that women, either as petitioners or respondents, tend to get custody of children much more often.

In only 2% of cases where the woman petitioned was custody awarded to the respondent male - though it must be noted that in 43.8% of all cases brought by women, there were no children. But in 19.3% of cases brought by men, custody was awarded to respondent wives. Legal role, insofar as it reflects fault, is thus not a definitive cause for the non-award of custody to a woman. But the practice generally is to make such an award in favour of the mother. We could speculate that many of the petitioning men did not wish custody of the children or felt that resistance would be expensive and futile. It is worth noting, though, that by contesting a divorce petition filed by their wives, respondent husbands increase their normally slim chances of getting custody of the children five times; contestation by respondent wives improves their already strong chances by a factor of 1.5. Child custody thus emerges as the principal cause of delay in that the children form part of the valued dispersible assets of the "bankrupt" marriage.

Table 10

Sex of Petitioner and Allocation of Child Custody:
Canadian Divorce Actions 1969-1977

(percentage distribution)

Allocation of Child Custody	Sex of Petitioner	
	Male	Female
Award to Petitioner	15.0%	49.5%
Award to Respondent	19.3	2.0
Award to Third Party	0.2	0.2
Split Award	2.0	1.2
No Award	7.0	3.3
No Children of the marriage	56.5	43.8
Totals:	100%	100%
N =	(132223)	(250580)

Divorce actions are thus shown to be in a class of civil actions by themselves. The normal strategies of the typical civil case are not relevant, and generalizations formed on the basis of other types of civil cases clearly do not apply.

Indeed, it might be fairly suggested that they are so different as to be considered for most purposes as proceedings before an administrative tribunal, although judicial in nature. Any further legislative change away from fault grounds to failure grounds on the allowable "reasons" for divorce might well take these actions out of the normal adversarial process altogether.

CONCLUSIONS

As Felstiner has written, "the dispute processing practices prevailing in any particular society are a product of its values, its psychological imperatives, its history and its economic, political and social organization" (1974:63). But the function of civil justice in the social control mechanisms of society is neither simple nor immediately clear. It exists in part to place the weight of the State behind agreements voluntarily entered into, and implicit rights and obligations as well. There is also an element of sanctioning.

The awarding of punitive damages, the assessment of fault in divorce actions, and the issuing of ex parte injunctions do not merely redress wrongs but also contain an element of an attempt to shape future behaviour, both of the object of the action and of others as well. It is not merely a counterpart to the "making

of an example" in a criminal case, however. Civil law is private law. Here, the aggrieved party has to act at his own expense and on his own behalf and without support of the State -- though it may intervene as a third party in particularly important cases. While the majority of cases do deal with private property in some fashion, the regulation of human behaviour, for example in child custody cases, is also very much a part of the overall civil justice system.

The element of flexibility which such a system introduces lies in the fact that judgements and, indeed, pre-trial settlements can be tailored to particular cases. The system is thus well suited to adaptation to emergent forms of property relationships. But is is also this same flexibility which makes systematic study so difficult.

The fact that inter-juristictional differences prove to loom so large is illustrative of the extent to which localized norms form the core of civil practice. The pressure is in the direction of conformity to locally defined formal and informal norms of propriety. And these perforce would contain sex role elements.

Briefly to summarize this exploratory study of Canadian civil litigation, it is evident that there are marked differences along gender lines -- differences in the participation rates of men and women in civil proceedings, in the features of civil suits brought by and against women, and in the outcomes of their cases. With the important exception of divorce cases, women have a relatively minor role as litigants in comparison to organizations (which predominate),

and to men. Women tend to come to civil courts as plaintiffs for different reasons and in a different fashion than do men. On the available evidence, women plaintiffs appear to fare less well as a group than other types of plaintiffs. While each of these general findings might be treated as analytically separate for purposes of explanation, it seems to us that in some important respects all three are probably bound up together, sharing common roots. We have suggested generally that these findings are not a manifestation of discriminatory patterns in the courts or the legal system itself; but we are compelled to search for other explanations.

On the face of it, the patterns we have discussed here must justly be termed discrimination if one follows the definition of that term offered by James J. White. He writes, "...discrimination includes every differentiation, whether or not it is rational or functional" (1967:1084). Clearly, men and women in Canadian civil courts can be differentiated on a number of dimensions: proportion of cases brought, type of cases brought, incidence of "success", etc. The question is, however, whether this discrimination is explicable in terms of volitional human agency or rather is just one more outcome of a far more general cultural pattern of sex role differentiation. Since we do not have information on the motives of the litigants, or the court officials or lawyers who dealt with them, the first general explanation is closed to us. We cannot infer such malevolent motivation nor invoke it as a hidden unitary "cause" of the patterns observed.

Pursuing an analogy to the treatment of women caught up in the criminal justice system, we are left with something a paradox.

With reference to criminal charges, if "one of the most tenacious beliefs in our society is that women require more protection than men" (Schlossman and Wallach, 1978:67), then why are there not more women in the civil courts in pursuit of redress? Evidently, the domain of the civil court is not a receptive environment for women, with the exception of divorce actions of course. In the latter, women achieve their aims much more often than men. Perhaps these are but exceptions to a general rule, the application of which is generally unfavourable to women except where cultural concessions are granted as in the case of the criminal charge or divorce.

But what is it about the general realm of civil actions which produces not a culturally consistent paternalistic over-protection of women, but rather, as the present data suggest, the opposite? The answer may lie in the nature of the cases.

At the outset of this study we cited a number of conditions necessary for a case to be brought before a civil court for formal adjudication:

- the potential petitioner must have violable rights or disputable interests; this means not only possessing the interests, but having their violability spelled out in law.
- those rights must ostensibly have been infringed or the interests violated.
- the self-ascribed "wronged" party must have an awareness of his or her legal rights along with the will and the resources (time, money, and social knowledge) to contest that situation.
- there will be, in most instances, a failure of informal dispute resolution.

To the extent that one or more of these conditions are not met, then the probability of litigation being initiated is reduced. Thus, an account of our statistical patterns could comprise the following elements:

- women in Canadian society do not, by and large, possess the sorts of interests which are likely to give rise to dispute or rights likely to be violated; or else, those interests or rights which they do claim are not sufficiently protected by law to support litigation.
- the interests or rights distinctively typical of Canadian women are infringed or violated with lesser frequency than other kinds of interests and rights (those identified mostly with men and with organizations).
- women lack sufficient legal awareness, will, and resources to challenge, through litigation, infringements of their interests or rights.
- female litigants are less amenable than other kinds of participants to informal settlement of their disputes.

The last two factors must be rejected out of hand for lack of any evidence whatever; the first two factors remain for serious consideration.

The greatest proportion of civil court cases (exclusive of divorce) are concerned, in one way or another, with the ownership of capital, and the consequences of same. Capital has been damaged or lost or its earning power has been impaired, and redress is sought. If women are viewed as inappropriate participants in battles over capital, then the patterns we see are consistent. But such an

explanation, although appealing, is probably simplistic. It is not that women, as possessors of capital, fare poorly -- although that would be one interpretation of the "success" findings here, but rather that the capital which Canadian women in the aggregate possess and the rights of other kinds they chose to exercise are not of the sort which give rise to suits. Clear ownership of common stocks, for instance, would much less often give rise to litigation than would say, the entrepreneurial use of capital such as the holding of mortgages on speculative real estate ventures. One must, in short, have something to lose in order to be the subject or object of the modal Canadian civil suit -- and Canadian women as a group are probably much less likely to engage in entrepreneurial activities which give rise to the possession of such vulnerable properties. And, it must be noted, the risk-taking behaviour of the entrepreneur is the apotheosis of everything not customarily contained in the traditional woman's role.

It is not necessary to label the phenomenon we have just discussed as a clear example of injustice either. One cannot infer a connection between suing successfully and having been the victim of injustice. One could rather make the assumption that pre-trial settlements represent negotiated saw-offs, and judgements, a sort of rough justice in the context of shared culpability where issues must be decided one way or another and where partial awards can reflect the muddied circumstances. Whereas one cannot be half convicted in a criminal case, the award of half the amount claimed or counterclaimed is a common option.

A particularly telling point here is the distinctive composition of cases brought by women when compared to male and organizational plaintiffs. Women sued over family matters ten times as frequently as did men (and two hundred times more frequently than did organizations). They also sue for divorce twice as frequently as do men. Suits by women alone over traffic and other types of injuries were proportionately about 50% greater than were those by men alone. (And injury torts by women with males or with organizations as co-plaintiffs were proportionately even greater.) But women filed contract and property suits proportionately only half as frequently as did men and one-third as frequently as organizations. It is abundantly clear that the areas in which women distinctively seek legal redress for loss or violated rights are family matters and physical injury. This, of course, is entirely consistent with the image ascribed by our culture to women.

The much lower absolute frequency of women being involved in civil courts as plaintiffs also suggests that their interests and rights may be infringed far less often, or that these are interests and rights which have insufficient protection in law. It could also indicate that women as a group do not believe that legal redress through civil litigation provides acceptable restoration of their interests, or that fewer women are sufficiently aware of their legal position to seek legal redress when faced with loss or violation of interests. (The lower success rate of female plaintiffs offers marginal support for such a belief.)

One potential argument against the blanket dismissal of the notion of purposive discrimination is the fact of male dominance

in the occupational world of the courts. As is documented elsewhere, court officers are overwhelmingly male. It may also be the case that lawyers give differential advice to men and women as a reflection of their own personal views about sex role propriety. It further might be the case that men and women react differently to the same advice, similarly given. Excessive deference, quiescence, or willingness to take orders would necessarily be relevant personal factors in the behaviour of a litigant. The point here is not to dismiss these hypotheses out of hand, but rather to say that we have no evidence to offer about them. About all we can say is that women litigants as a group do not suffer from a disproportionate lack of legal advice, at least on the presence/absence dimension.

Still more tricky as a hypothetical proposition would be that some litigants are intimidated by the highly pressured, individualized, and male-directed behaviour required in the courtroom as a social milieu. This may also be proven to be a factor in future behavioural studies but it clearly remains as just an idea now.

We are left, then, with an incomplete and bewildering picture of women and civil litigation in Canada. They seem to fare relatively poorly; but since excellent cases tend to be settled before the process gathers momentum, we cannot be sure of this at all. We can only hope, in the end, that there will be further effort to cast more empirical light on the many strategic and theoretically relevant issues which could only be raised here but by no means satisfactorily accounted for. That such effort would be worthwhile is beyond dispute, for what transpires in our courtrooms and judicial chambers has symbolic significance about our culture and social order far out of proportion to its directly visible consequences.

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